128

(1)

Supreme Court, U.S.
FILED

08 14 2 7 MAY 19 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

COREY ALAN BROCKMAN,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor St., Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

JONATHAN D. HACKER
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

QUESTION PRESENTED

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner's federal sentence run consecutively with a state sentence that had yet to be imposed. That ruling perpetuates a direct and acknowledged circuit conflict concerning a federal district court's authority under 18 U.S.C. § 3584(a)—the statute governing consecutive and concurrent sentences—to order a federal sentence to be served consecutively with a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack such authority. The Government has acknowledged that conflict and conceded that district courts lack the authority to impose such a sentence.

The question presented is:

Whether a district court has authority to order a defendant's federal sentence to be served consecutively with a state sentence that has not yet been imposed.

PARTIES TO THE PROCEEDING

Petitioner is Corey Alan Brockman, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATUTES INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. THE COURT OF APPEALS' DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL 6

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE 7

A. Petitioner's Unlawful Sentence Forecloses A Two-Year Reduction In His Period Of Incarceration 8

B. The Fifth Circuit Has Refused To Reconsider Its Precedent 11

CONCLUSION 14

TABLE OF CONTENTS
(continued)

Page

APPENDIX A
N.D. TEXAS JUDGMENT 1a

APPENDIX B
5TH CIRCUIT JUDGMENT 4a

APPENDIX C
5TH CIRCUIT ENBANC REHEARING ORDER 7a

APPENDIX D
N.D. TEXAS SENTENCING HEARING TRANSCRIPT 9a

APPENDIX E
RELEVANT STATUTORY PROVISIONS 15a

TABLE OF AUTHORITIES

Page(s)

CASES

Romandine v. United States,
206 F.3d 731 (7th Cir. 2000) 6

Trowell v. Beeler,
135 F. App'x 590 (4th Cir. 2005) 10

United States v. Ballard,
6 F.3d 1502 (11th Cir. 1993) 6

United States v. Brown,
920 F.2d 1212 (5th Cir. 1991) 3, 6

United States v. Clayton,
927 F.2d 491 (9th Cir. 1991) 6

United States v. Donoso,
521 F.3d 144 (2d Cir. 2008) 6

United States v. Farris,
No. 08-10277, 2009 WL 464221
(5th Cir. Feb. 23, 2009) 12

United States v. Garcia,
No. 08-50161, 2009 WL 411518
(5th Cir. Feb. 18, 2009) 12

United States v. Garcia-Espinoza,
No. 08-10775
(5th Cir. May 15, 2009) 11

United States v. Jochum,
No. 08-10847, 2009 WL 405865
(5th Cir. Feb. 18, 2009) 12

United States v. Maden,
No. 08-11031, 2009 WL 413577
(5th Cir. Feb. 18, 2009) 12

United States v. Mayotte,
249 F.3d 797 (8th Cir. 2001) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Quintero,
157 F.3d 1038 (6th Cir. 1998) 6

United States v. Scott,
No. 08-10846, 2009 WL 415256
(5th Cir. Feb. 18, 2009) 12

United States v. Valenciano-Espinoza,
No. 08-10970, 2009 WL 413592
(5th Cir. Feb. 18, 2009) 12

United States v. Williams,
46 F.3d 57 (10th Cir. 1995) 6

Young v. State,
579 S.W.2d 10 (Tex. Crim. App.
1979) 5

STATUTES

18 U.S.C. § 3584(a) 7, 10

18 U.S.C. § 3553(a) 7

18 U.S.C. § 3621(b) 10

ADMINISTRATIVE AUTHORITY

Federal Bureau of Prisons, U.S. Dep't of
Justice, Program Statement No.
5160.05, *Designation of State
Institution for Service of Federal
Sentence* (Jan. 16, 2003) 9, 11

OTHER AUTHORITY

Michael J. McCormick et al., 7A Tex.
Prac., Criminal Forms and Trial
Manual § 77.16 (11th ed. 2009) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Corey Alan Brockman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but available at 2009 WL 405868 and reprinted at App. 4a-5a. The district court issued no opinion; its judgment is reprinted at App. 1a-3a.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. App. 6a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 15a-18a.

INTRODUCTION

This petition raises the question whether a district court has authority to order a federal sentence to be served consecutively with a state sentence that has yet to be imposed. This Court has been holding two petitions presenting that issue since the February 20, 2009 conference, *see Goodgion v. United States*, No. 08-5920 (filed Aug. 20, 2008); *Garcia v. United States*, No. 08-6756 (filed Oct. 6, 2008), and two other petitions on the issue are also pending before the Court. *Smith v. United States*, No. 08-8118 (petition filed Jan. 3, 2009; opposition filed April 29,

2009); *Brent v. United States*, No. 08-9319 (petition filed Mar. 16, 2009; response due May 20, 2009).

In its responses to those petitions, the Government has acknowledged that the courts of appeals are divided, 4-4, over this question. And after remaining silent on the merits over the course of many years, the Government has finally conceded in these responses that sentences like the one imposed by the district court in this case are unlawful.

Even after confessing error, however, the Government has continued its longstanding practice of opposing this Court's review of the issue. The Government has argued that the unlawful sentencing practice has not significantly harmed any of the petitioners. And it has argued that the issue may be reconsidered by the circuits that have approved the practice.

Neither argument withstands analysis in this case. The unlawful sentence in this case demonstrably harms petitioner. Absent the consecutive sentencing order, petitioner could obtain credit on his federal sentence for the time he serves on his state sentence, reducing his total period of incarceration by two years. The illegal sentencing order categorically bars petitioner from obtaining that credit and thus condemns him to two additional years of incarceration. And even after the Government confessed error, the Fifth Circuit denied en banc review of the question. Having only recently denied en banc consideration, there is no realistic possibility that the Fifth Circuit will correct this indefensible sentencing practice. The Court should therefore grant the petition and reverse the decision below.

STATEMENT OF THE CASE

1. On December 15, 2007, local law enforcement officers received a phone call from petitioner's grandmother alerting them that petitioner, a convicted felon, had taken her husband's deer rifle and pawned it at a pawn shop. Petitioner's Presentence Report ("PSR") ¶ 12. After the officers investigated the matter, they located petitioner and informed him that, by pawning the rifle, he had been in possession of a firearm in violation of federal and state law. *Id.* ¶ 17.

On February 13, 2008, the Government filed a three-count indictment against petitioner, alleging, *inter alia*, that he had violated 18 U.S.C. § 922(g)(1) by possessing a firearm as a convicted felon. PSR ¶ 1. Pursuant to a written plea agreement, petitioner pleaded guilty to that charge. *Id.* ¶ 3.

2. Petitioner's PSR noted that charges were pending against petitioner in the District Attorney's Office for Taylor County, Texas, for Forgery, Illegal Dumping, and Assault, and that there was a pending case in Taylor County against petitioner for Criminal Mischief. PSR ¶ 77-78. The PSR advised the district court that it could "exercise discretion" in determining whether to make petitioner's federal sentence consecutive with "sentences anticipated, but not yet imposed, in separate state court proceedings." *Id.* ¶ 76. Petitioner filed a written objection to the court imposing a sentence "consecutive to any as-yet-unimposed sentence." PSR Addendum.

At sentencing, petitioner renewed this objection. App. 10a-11a. The Government responded that "*Brown* [*United States v. Brown*, 920 F.2d 1212 (5th

Cir.) (per curiam), *cert. denied*, 500 U.S. 925 (1991)] settles the law in the Fifth Circuit." App. 11a. The district court concluded that the objection "should be overruled for the reasons as set forth in the [PSR] addendum." App. 11a; *see* PSR Addendum (stating that "Fifth Circuit law" authorized such a consecutive sentence). The district court sentenced petitioner to 24 months of imprisonment and 3 years of supervised release. And it further ordered that petitioner's federal sentence "be served consecutive with any sentence imposed in the case presently pending against [him] in the 350th District Court of Taylor County, Texas, as well as consecutive with any future charges and case that might be filed against [him] and sentence to be imposed against [him] if [he were to be] found guilty of those charges that are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas." App. 12a.

3. A state court subsequently sentenced petitioner on the pending Taylor County charges, ordering him to serve one year and eight months for the offense of criminal mischief and four years for aggravated assault. The state court ordered the criminal mischief sentence to run "concurrently" (without specifying whether that included petitioner's federal sentence) and did not state whether the four-year assault term should be served concurrently or consecutively. *See* Judgment of Conviction, *Texas v. Brockman*, No. 08223D (Taylor County Nov. 6, 2008) (mischief); Judgment of Conviction, *Texas v. Brockman*, No. 8823D (Taylor County Nov. 6, 2008) (assault). That order has the effect, under state law,

of requiring petitioner's sentence to run concurrently with previously imposed sentences.[1]

Petitioner's projected release date from the state penitentiary is January 25, 2012. *See* Tex. Dep't Crim. Justice Offender Information Detail, Corey Brockman, *available at* http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347.

4. Petitioner appealed his federal sentence and argued that the district court had exceeded its statutory authority in ordering that his federal sentence run consecutively with state sentences that had yet to be imposed. *See* Pet'r C.A. Br. 2-4. Petitioner acknowledged that Fifth Circuit precedent foreclosed his claims but sought summary adjudication to preserve the issue for review in this Court. *Id.* The court of appeals summarily affirmed. App. 4a-5a.

REASONS FOR GRANTING THE PETITION

In this case, the Fifth Circuit held that a district court has authority to order that a federal sentence run consecutively with a yet-to-be-imposed state sentence. That holding perpetuates an entrenched, 4-4 circuit conflict that the Government has acknowledged, and it affirms a sentencing practice that the Government has conceded is unlawful. The argu-

---

[1] Under Texas law, all sentences run concurrently unless "cumulated in the proper manner." Michael J. McCormick et al., 7A Tex. Prac., Criminal Forms and Trial Manual § 77.16 (11th ed. 2009). That "proper manner" requires the sentencing court to designate, among other things, "the convicting courts, the offenses upon which convictions were had, the dates of the sentences [to which the imposed sentence is to be cumulative], and the terms of years assessed." *Young v. State*, 579 S.W.2d 10, 11 (Tex. Crim. App. 1979).

ments the Government has made against review in other cases presenting this issue provide no reason to deny review in this case. This Court should therefore grant the petition and stop this unlawful practice.

I. THE COURT OF APPEALS' DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL

As the Government has acknowledged, the courts of appeals are divided, 4-4, on the question whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. *See, e.g.*, Br. in Opp., *Smith v. United States*, No. 08-8118, at 21-22 (filed Apr. 29, 2009) ("*Smith* Opp.") (describing split). The Second, Sixth, Seventh, and Ninth Circuits have all held that a district court lacks the authority to issue such a sentence. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See Brown*, 920 F.2d at 1216; *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*, 516 U.S. 926 (1995); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993).

The Government has conceded, moreover, that "Section 3584(a) does not confer th[e] authority" to "direct that a sentence be served consecutively to a yet-to-be-imposed state sentence." *Smith* Opp. at 20-21. Indeed, the text of 18 U.S.C. § 3584(a) makes clear that a district court is authorized to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*," or (2) "if a term of imprisonment is imposed on a defendant who is *already subject* to an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). As the Government has acknowledged, to hold that a district court also has authority to make a federal sentence consecutive with a state sentence that has not yet been imposed would render a large portion of Section 3584(a) surplusage. *Smith* Opp. at 22. Furthermore, as the Government has conceded, a district court "cannot logically" "consider the sentencing factors set out in 18 U.S.C. 3553(a) in making a decision whether to impose a term of imprisonment consecutively or concurrently to another term" when "one of [those] sentences has not yet been determined." *Smith* Opp. at 23. Thus, the sentence imposed by the district court in this case is indisputably unlawful.

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE.

For many years, the sentencing practice at issue here has been prevalent in a number of circuits, including the Fifth Circuit. And for many years, the

Government opposed review of the issue without taking any position on the merits of the practice.

Having finally decided to confess error on the issue, there was reason to hope that the Government would join with a petitioner to urge the Court to end this blatantly unlawful sentencing practice. Instead, the Government has persisted in opposing review.

The Government has offered two reasons for doing so. First, it has argued that the unlawful sentencing practice does not have any significant impact on criminal defendants. *Smith* Opp. at 23, 28; *see* Br. in Opp., *Cortes-Beltran v. United States*, No. 08-8243, at 21 (filed Apr. 13, 2009) ("*Cortes-Beltran* Opp.") (same). And second, it has argued that the circuits that currently sanction illegal consecutive sentences might reconsider their view in light of the Government's confession of error. Neither argument provides any basis for denying review in this case.

A. Petitioner's Unlawful Sentence Forecloses A Two-Year Reduction In His Period Of Incarceration.

Petitioner has an undeniably concrete interest in obtaining a reversal of his unlawful consecutive sentence. That sentence subjects petitioner to an additional two years in prison that he might avoid under a lawful sentence.

Petitioner is currently serving a four-year state sentence in a state facility. Under settled BOP policy, petitioner may request that the BOP issue a "nunc pro tunc" designation under which his time in state detention would count toward his two-year federal sentence. Federal Bureau of Prisons, U.S. Dep't

of Justice, Program Statement No. 5160.05, *Designation of State Institution for Service of Federal Sentence* § 9(b)(4) (Jan. 16, 2003) ("BOP Program Statement"). In petitioner's case, that would mean that the BOP could deem his entire two-year federal sentence to have been served during his period of state incarceration.

The district court's consecutive sentence order, however, categorically bars the BOP from exercising its discretion to grant a request for nunc pro tunc designation. The BOP has expressly stated that it "will not allow a concurrent designation" where, as here, "the sentencing court has already made" the sentence "consecutive." BOP Program Statement 5160.05 § 9(b)(4)(f). The district court's unlawful consecutive sentence therefore precludes petitioner from obtaining a nunc pro tunc designation that would reduce his period of incarceration by two years.

The Government has argued that persons in petitioner's position have no ground for complaint, because, even absent the court's order, the BOP would have discretion to deny a nunc pro tunc request, and, in exercising that discretion, would solicit and consider the district court's view. *Smith* Opp. at 29; *see* BOP Program Statement 5160.05 § 9(b)(4)(c) (in making nunc pro tunc determination, the BOP "will send a letter to the sentencing court . . . inquiring whether the court has any objections" to designation).

There is an enormous difference, however, between a district court order that requires petitioner to serve two additional years of imprisonment, and a

district court order that allows the BOP to exercise its discretion to eliminate that additional two years of imprisonment entirely. In one case, the district court's order is controlling, and there is no possibility that the total time of incarceration will be reduced; in the other case, the district court's view is simply one factor among others that the BOP considers, and there remains a concrete opportunity for petitioner to reduce his period of incarceration by two years. Indeed, the Government freely admits that it is bound to consider a broad range of factors in the latter situation, and that it may not treat the district court's views as "dispositive." *Smith* Opp. at 26; *see Cortes-Beltran* Opp. at 26 (citing *Trowell v. Beeler*, 135 F. App'x 590, 594-96 (4th Cir. 2005), as "holding that BOP must consider all factors set out in 18 U.S.C. 3621(b), not just the sentencing court's views").

There is also an immense difference between how a district court determines whether to make a federal sentence consecutive with a state sentence before the state sentence is imposed and how a district court decides what to recommend to the BOP after a state sentence has been imposed. As the Government observed in explaining why Section 3584 cannot be read to authorize sentences like petitioner's, a district court cannot intelligently decide "whether to impose a term of imprisonment consecutively or concurrently to another term" without "consideration of the total length of incarceration." *Smith* Opp. at 23. There is therefore no reason to believe that a district court that issues a consecutive sentencing order before knowing what the state sentence will be would make that same recommendation once it finds out

the length of the state sentence. In petitioner's case, for example, the fact that the district court issued a consecutive sentencing order when it had no idea whether petitioner would serve any time at all on his state charges says nothing about what recommendation the district court will make after learning that a state court has sentenced petitioner to four years of imprisonment.

In the end, regardless of what the district court recommends, it is the BOP's responsibility to consider all the relevant circumstances and decide whether petitioner should receive credit for his period of state incarceration. Under petitioner's current, unlawful sentence, however, the BOP is categorically foreclosed from making that judgment; it has no choice other than to carry out the district court's consecutive sentence order. BOP Program Statement 5160.05 § 9(b)(4)(f). This Court's reversal of the order will eliminate that unlawful impediment to the BOP's exercise of authority and provide petitioner with a realistic opportunity to serve two less years of imprisonment.

B. The Fifth Circuit Has Refused To Reconsider Its Precedent.

The Government's argument that review should be denied because the Fifth Circuit may reverse its precedent is equally without merit. The is no realistic prospect that the Fifth Circuit will correct the practice of imposing federal sentences that are consecutive with state sentences that are not yet imposed.

After the Government confessed error on the issue, the Fifth Circuit, in *United States v. Garcia-Espinoza*, No. 08-10775, asked whether it should grant hearing en banc to overrule its precedent. *See* U.S. Br., *Garcia-Espinoza*, No. 08-7775, at 1 (filed Mar. 4, 2009) (describing December 18, 2008 order). But the Fifth Circuit ultimately denied hearing en banc on the issue, with no judge in regular active service requesting a poll. App. 7a-8a (order rejecting Garcia-Espinoza's motion for hearing en banc). The Fifth Circuit subsequently affirmed the sentence in *Garcia-Espinoza*, with only one judge urging that the issue be resolved en banc. *United States v. Garcia-Espinoza*, No. 08-10775, slip. op. at 3 (5th Cir. May 15, 2009) (Owen, J., concurring).

The Government asserts that the Fifth Circuit may be looking for a more appropriate vehicle than *Garcia-Espinoza* to revisit its precedent. *Smith* Opp. at 28. But the experience in the Fifth Circuit provides no support for the Government's speculation. Since requesting and receiving the petition for en banc review in *Garcia-Espinoza*, the Fifth Circuit has affirmed *seven* district court orders requiring that federal sentences be served consecutively with state sentences that had yet to be imposed. *See* App. 4a-5a (petitioner's case); *United States v. Farris*, Nos. 08-10277, 08-10279, 2009 WL 464221 (5th Cir. Feb. 23, 2009) (per curiam); *United States v. Scott*, No. 08-10846, 2009 WL 415256 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Valenciano-Espinoza*, No. 08-10970, 2009 WL 413592 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Maden*, No. 08-11031, 2009 WL 413577 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Garcia*, No. 08-

50161, 2009 WL 411518 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Jochum*, No. 08-10847, 2009 WL 405865 (5th Cir. Feb. 18, 2009) (per curiam). That is hardly consistent with what a circuit would do if it were looking for an appropriate vehicle to overrule its precedent.

The Government's suggestion that the Court should wait for the Fifth Circuit to solve this problem has a particularly hollow ring because the Government does not believe that an appropriate vehicle for resolving the issue can ever exist. When a person begins by serving his federal sentence, and the state sentence has yet to be imposed, the Government invariably argues that an illegal consecutive sentence has no "concrete practical effect" because the state court may "make the state sentence effectively concurrent" by shortening the state term or suspending it completely. Br. in Opp., *Martinez-Guerrero v. United States*, No. 07-1362, at 8-9 (filed Aug. 27, 2008). And when a person begins by serving his state sentence, the Government invariably argues that an illegal consecutive sentence has "no practical effect" because the "BOP retains the discretion to deny [a] request [for nunc pro tunc designation] even when the federal court judgment is silent as to the order of the sentences." Response of the U.S. to Appellant's Pet. for Reh'g En Banc, *United States v. Lowe*, No. 08-2304, at 6 (8th Cir. Apr. 1, 2009). Not surprisingly, while holding out the possibility that the Fifth Circuit may one day solve this problem, the Government does not suggest that it will ever urge the Fifth Circuit to do so.

The time to end this practice is now, and this is the case in which to do so. The arguments advanced by the Government against review of previous cases carry no weight here: petitioner has properly preserved the issue for plenary review, and the harm caused by his unlawful sentence is demonstrable. This Court should grant the petition and resolve this conflict once and for all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor St., Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

JONATHAN D. HACKER
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

May 19, 2009

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA,	Case Number: 1:08-CR-009
Plaintiff,	USM No. 37527-177
v.	Filed Aug. 27, 2008
COREY ALAN BROCKMAN,	
Defendant.	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, COREY ALAN BROCKMAN, was represented by David Sloan.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to count 1 of the indictment filed on 02/13/2008. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense
18 U.S.C. § 922(g)(1) [Penalty found in 18 U.S.C. § 924(a)(2)	Convicted Felon in Possession of a Firearm
Date of Offense	**Count Number**
12/12/2007	1

As pronounced on 08/27/2008, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 27th day of August, 2008.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 8223D, 350th District Court, Taylor County, Texas. Additionally, this term of imprisonment shall run consecutive with any sentence that may be imposed in the charges of Forgery, Illegal Dumping, and Assault which are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas, and as to any charges that may be filed with a Taylor County Court, Taylor County, Texas, on these offenses.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on ____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10882
Conference Calendar

FILED
February 18, 2009
Charles R. Fulbridge III, Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

COREY ALAN BROCKMAN

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:08-CR-9-ALL

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appealing the Judgment in a Criminal Case, Cory Alan Brockman presents arguments that he concedes are foreclosed by *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006), which held that a district court may order a term of imprisonment to run consecutively with an unimposed state sentence. The appellant's motion for summary disposition is GRANTED, and the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10882
Conference Calendar

D.C. Docket No. 1:08-CR-9-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

FILED
February 18, 2009
Charles R. Fulbridge III, Clerk

COREY ALAN BROCKMAN

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas at Abilene

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file. It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

A True Copy
Attest
Clerk, U.S. Court of Appeals, Fifth Circuit
By: _____
Deputy
New Orleans, Louisiana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10775

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERTO GARCIA-ESPINOZA

Defendant-Appellant

U.S. COURT OF APPEALS
FILED
APR 13 2009
Charles R. Fulbridge III, Clerk

.....

Appeal from the United Stated District Court for the Northern District of Texas at Lubbock

.....

ON MOTION FOR HEARING EN BANC

Before KING, DENNIS, and OWEN, Circuit Judges.

(✓) No member of the panel nor judge in regular active service on the court having requested that the court be polled on Hearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Motion for Hearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the

judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Motion for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Priscilla A. Owen
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

COREY ALAN BROCKMAN,

Defendant.

No. 1:08-CR-009

LUBBOCK, TEXAS

AUGUST 27, 2008

**SENTENCING HEARING
BEFORE THE HONORABLE
SAM R. CUMMINGS,
UNITED STATES DISTRICT JUDGE**

APPEARANCES

FOR THE GOVERNMENT:	United States Attorney's Office 1205 Texas Avenue, Suite 700 Lubbock, Texas 79401 By: C. Richard Baker
FOR THE DEFENDANT:	Federal Public Defender's Office 1205 Texas Avenue, Suite 506

Lubbock, Texas 79401
By: David E. Sloan

OFFICIAL COURT REPORTER: Mechelle Daniel
1205 Texas Avenue
Lubbock, Texas 79401
(806) 744-7667

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

* * * * * *

THE COURT: The Court calls for sentencing Cause Number CR1-08-009, United States of America vs. Corey Brockman.

MR. BAKER: Ready for the United States, Your Honor.

MR. SLOAN: The defendant is present and ready, Your Honor.

THE COURT: The file reflects that a presentence report has been prepared. Mr. Brockman, have you gone over that report with your lawyer?

THE DEFENDANT: Yes.

THE COURT: The file also reflects that the government has filed a statement adopting the matters set forth in the presentence report. The defendant has filed an objection to the report. Counsel, if you wish, you may address that objection.

MR. SLOAN: Your Honor, the objection that I

filed has to do with the stacking of time to as-yet-unimposed state sentences. This is an objection the Court has seen before. I'm told by Appellate that I'm obligated to raise it at this point, and so I would raise it and stand on the written motion--or stand on the written objection.

THE COURT: All right. Government's response?

MR. BAKER: Brown settles the law in the Fifth Circuit, Your Honor.

THE COURT: The Court, having considered the objection, is of the opinion it should be overruled for the reasons as set forth in the addendum. The Court then will adopt as the Court's findings those matters set forth in the presentence report and the addendum, not only as it relates to the background data and information, but also the analysis made under the sentencing guidelines. Does the government have any evidence or argument?

MR. BAKER: No, Your Honor, other than to move, pursuant to the plea agreement, to dismiss Counts 2 and 3.

THE COURT: That motion is granted. We will proceed in reference to Count 1. Does the defense have any evidence or further argument?

MR. SLOAN: Judge, I would ask for a nonbinding placement recommendation to Big Spring, and nothing else.

THE COURT: Mr. Brockman, you have the right to address the Court this morning prior to the imposition of sentence. You are not required to say

anything, should that be your choice, but the law does afford you that right and opportunity. Is there anything which you wish to state to the Court this morning?

THE DEFENDANT: No, sir.

THE COURT: Mr. Brockman, you pleaded guilty to Count 1 of the indictment charging you with being a convicted felon in possession of a firearm. You having pleaded guilty to that charge, I found you guilty, and I am now adjudging you guilty of that offense.

Having adjudged you guilty, I am now going to impose the following sentence:

First, I'm ordering that you pay a special assessment of $100.

Next, I'm ordering that you be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months, with this term of imprisonment to be served consecutive with any sentence imposed in the case presently pending against you in the 350th District Court of Taylor County, Texas, as well as consecutive with any future charges and case that might be filed against you and sentence to be imposed against you if you are found guilty of those charges that are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas.

I will recommend that you be placed at FCI Big Spring.

Upon your release from incarceration, I'm

ordering that you serve a 3-year term of supervised release. You will get a copy of the judgment so you will know what the conditions of supervision are. There are some standard conditions, as well as special conditions.

Some of those special conditions include the following:

First, you shall participate in a program approved by the United States Probation Office for the treatment of narcotic, drug or alcohol dependency.

Next, you shall participate in mental health treatment service programs as directed by the United States Probation Office.

Next, you shall cooperate in the collection of any DNA as directed by the United States Probation Office.

I will now state on the record the specific reasons for imposing the sentence I have just imposed.

As to the term of incarceration, I have imposed a term of 24 months. I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

No fine is assessed for the reason I do not believe the defendant has sufficient assets with which to pay a fine.

The supervised release is imposed for the reason believe the defendant will need this amount of supervision to see that he re-assimilates himself

back in society, that he obtains suitable employment, and that he maintains a law-abiding lifestyle.

The special assessment is imposed because the law mandates that it be.

Now, Mr. Brockman, you have the right to appeal as authorized by law or as stated in your plea agreement. Should you choose to appeal, you must file your notice of appeal within 10 days from today. If you file that notice of appeal, you may also file a motion with the Court seeking permission to appeal at no cost to yourself, but rather at the cost of the government. Should you file that motion, I will take it under advisement and rule on it just as soon as I can.

You may stand aside.

(END OF HEARING)

* * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

_____ Date: October 2, 2008

Michelle Daniel
Official Court Reporter

APPENDIX E

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3584. Multiple Sentences of Imprisonment

(a) Imposition of concurrent or consecutive terms.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms.--The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term

of imprisonment.

---

18 U.S.C. § 3553. Imposition of a Sentence

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range

established for··

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines··

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement··

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to

such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(2)

No. 08-1427

In the Supreme Court of the United States

COREY ALAN BROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred by directing that petitioner's federal sentence be served consecutively to a state sentence that had not yet been imposed.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Andrews v. *United States*, 540 U.S. 1003 (2003) 8
Bishop v. *United States*, 129 S. Ct. 1307 (2009) 7
Cortes-Beltran v. *United States*, 129 S. Ct. 2380 (2009) ... 7
Cox v. *United States*, 547 U.S. 1127 (2006) 8, 13
DeLeon v. *United States*, 129 S. Ct. 1307 (2009) 7
Dimas v. *United States*, 129 S. Ct. 1307 (2009) 7
Garcia v. *United States*, 129 S. Ct. 2734 (2009) 7
Goodgion v. *United States*, 129 S. Ct. 2734 (2009) 7
King v. *United States*, 128 S. Ct. 706 (2007) 7
Lackey v. *United States*, 545 U.S. 1142 (2005) 8
Lopez v. *United States*, 128 S. Ct. 705 (2007) 8
Martinez v. *United States*, 543 U.S. 1155 (2005) 8
Martinez-Guerrero v. *United States*, 129 S. Ct. 52 (2008) 7
Ponzi v. *Fessenden*, 258 U.S. 254 (1922) 8
Romandine v. *United States*, 206 F.3d 731 (7th Cir. 2000) 6, 8
Smith v. *United States*, 129 S. Ct. 2735 (2009) 7
United States v. *Andrews*, 330 F.3d 1305 (11th Cir.), cert. denied, 540 U.S. 1003 (2003) 9

Cases—Continued: Page

United States v. *Ballard*, 6 F.3d 1502 (11th Cir. 1993) 6
United States v. *Brown*, 920 F.2d 1212 (5th Cir.), cert. denied, 500 U.S. 925 (1991) 3, 4, 6
United States v. *Clayton*, 927 F.2d 491 (9th Cir. 1991) 6
United States v. *Clinton*, No. 08-11007, 2009 WL 2512834 (5th Cir. Aug. 18, 2009) 16
United States v. *Collier*, No. 08-11071, 2009 WL 2513465 (5th Cir. Aug. 18, 2009) 16
United States v. *Diaz*, No. 08-10877, 2009 WL 1687805 (5th Cir. June 16, 2009) 16
United States v. *Donoso*, 521 F.3d 144 (2d Cir. 2008) 6
United States v. *Douglas*, 569 F.3d 523 (5th Cir. 2009) 9
United States v. *Farris*, 312 Fed. Appx. 598 (5th Cir. 2009), petition for cert. pending, No. 08-10700 (filed May 26, 2009) 14
United States v. *Garcia*, 310 Fed. Appx. 707 (5th Cir. 2009, petition for cert. pending, No. 08-10721 (filed May 19, 2009) 14
United States v. *Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199 (5th Cir. May 15, 2009) 13, 14, 15
United States v. *Hayes*, 535 F.3d 907 (8th Cir. 2008), cert. denied, 129 S. Ct. 1983 (2009) 9, 13
United States v. *Jochum*, 310 Fed. Appx. 679 (5th Cir.), cert. denied, 129 S. Ct. 2782 (2009) 14
United States v. *Lowe*, 312 Fed. Appx. 836 (8th Cir. 2009), reh'g en banc granted (Apr. 22, 2009) 12
United States v. *Maden*, 311 Fed. Appx. 695 (5th Cir.), cert. denied, 129 S. Ct. 2848 (2009) 14

Cases—Continued: Page

United States v. *Mayotte*, 249 F.3d 797 (8th Cir. 2001) 6, 9
United States v. *Quintana-Gomez*, 521 F.3d 495 (5th Cir. 2008) 9
United States v. *Quintero*, 157 F.3d 1038 (6th Cir. 1998) 6
United States v. *Scott*, 311 Fed. Appx. 703 (5th Cir.), cert. denied, 129 S. Ct. 2849 (2009) 14
United States v. *Smith*, 472 F.3d 222 (4th Cir. 2006) 6
United States v. *Valenciano-Espinoza*, 311 Fed. Appx. 696 (5th Cir.), cert. denied, 129 S. Ct. 2849 (2009) 14
United States v. *Williams*, 46 F.3d 57 (10th Cir.), cert. denied, 516 U.S. 826 (1995) 6, 9
Valenciano-Espinoza v. *United States*, 129 S. Ct. 2849 (2009) 7

Statutes and guidelines:

18 U.S.C. 922(a)(6) 2
18 U.S.C. 922(g)(1) 2
18 U.S.C. 922(j) 2
18 U.S.C. 3553(a) 7
18 U.S.C. 3553(a)(2)(B) 7
18 U.S.C. 3553(a)(2)(C) 7
18 U.S.C. 3553(a)(6) 7
18 U.S.C. 3584(a) ..... *passim*
18 U.S.C. 3584(b) 7

Statutes and guidelines—Continued: Page

18 U.S.C. 3621(b) 10, 11
18 U.S.C. 3621(b)(1) 12
18 U.S.C. 3621(b)(2) 12
18 U.S.C. 3621(b)(3) 12
18 U.S.C. 3621(b)(5) 11
United States Sentencing Guidelines:
§ 5G1.3, comment. (n.3(C)) 11
§ 5G1.3(b) 12

Miscellaneous:

Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05, Designation of State Institution for Service of Federal Sentence* (2003) 10, 11
Texas Dep't of Crim. Justice, *Offender Information Detail* (visited Aug. 25, 2009) <http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347> 4

In the Supreme Court of the United States

No. 08-1427

COREY ALAN BROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is not published in the Federal Reporter but is reprinted in 310 Fed. Appx. 681.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on February 18, 2009. A petition for rehearing was denied on April 13, 2009 (Pet. App. 7a-8a). The petition for a writ of certiorari was filed on May 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of being a felon in possession of a firearm, in

violation of 18 U.S.C. 922(g)(1). He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a-3a. The court of appeals affirmed. *Id.* at 4a-5a.

1. On December 12, 2007, petitioner pawned a Remington .270-caliber bolt-action rifle at Wild Bill's Pawn Shop in Abilene, Texas. When he returned the following day and attempted to retrieve it, he falsely stated on an ATF Form 4473 that he had never been convicted of a felony. In fact, he had previously been convicted in Texas state court of the felony offense of criminal mischief. The pawnshop employee refused to allow petitioner to redeem the weapon. Three days later, the Callahan County Sheriff's Office received a call from petitioner's grandmother advising that petitioner had taken her husband's deer rifle and pawned it in Abilene. Petitioner ultimately admitted to Abilene police officers that he had pawned the weapon, but suggested that he had permission from his grandmother to do so. Presentence Report ¶¶ 8-20 (PSR).

2. A federal grand jury sitting in the Northern District of Texas returned a three-count indictment charging petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); possession of a stolen firearm, in violation of 18 U.S.C. 922(j); and making a false statement to a federal firearms dealer, in violation of 18 U.S.C. 922(a)(6). Pursuant to a writ of habeas corpus *ad prosequendum*, petitioner was temporarily released from state custody on unrelated state charges to face the federal charges. PSR ¶¶ 1-2.

Pursuant to the terms of a written plea agreement, petitioner pleaded guilty to the felon-in-possession charge and the remaining charges were dropped. PSR 1 & ¶¶ 4-6. The PSR recommended an advisory Sen-

tencing Guidelines range of 18-24 months. PSR ¶¶ 26-27, 31-32, 75.

The PSR noted that petitioner faced a pending probation revocation for the offense of criminal mischief in Taylor County, Texas (Case No. 8223D), as well as three pending state charges in Taylor County for assault, forgery, and illegal dumping. PSR ¶¶ 77-78. The PSR noted that under Fifth Circuit precedent, the district court had the discretion to impose a sentence consecutive to any sentence that might be imposed on the state charges. PSR ¶ 76 (citing *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)). Petitioner preserved an objection to that practice. Pet. App. 10a-11a; Pet. PSR Resp.; PSR Addendum.

The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. The court provided that the sentence would run consecutively to any future state sentences imposed on the charges then pending in Taylor County. Pet. App. 3a, 12a.

Following sentencing, petitioner was returned to state custody. On October 29, 2008, the state trial court revoked his probation for his criminal-mischief conviction; sentenced him to 20 months of imprisonment on that charge; and sentenced him to four years of imprisonment on the aggravated-assault charge. (The state court also imposed a sentence of 16 months of imprisonment on a theft charge apparently not covered by the federal court's consecutive-sentencing order.) The state judgment of conviction indicates that the criminal mischief sentence is to run concurrently, but does not indicate whether the four-year sentence on the aggravated-assault conviction should be served consecutively or con-

currently.[1] Petitioner is currently serving those sentences and has not yet begun serving his federal sentence. His projected release date from state prison is January 25, 2012. Texas Dep't of Crim. Justice, *Offender Information Detail* (visited Aug. 25, 2009) <http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347>.[2]

3. The court of appeals affirmed summarily, in an unpublished, per curiam decision. Pet. App. 4a-5a (citing *Brown*, 920 F.2d at 1216-1217).

ARGUMENT

Petitioner contends (Pet. 5-14) that this Court's review is warranted because the courts of appeals are divided over whether a district court has the authority to direct that a sentence run consecutively to a state sentence that has not yet been imposed. The government agrees with petitioner that district courts lack such authority under 18 U.S.C. 3584(a). Nevertheless, for two reasons, further review in this case is not warranted to resolve the circuit conflict on that issue. First, the issue lacks real significance, because as a practical matter, state courts and the Federal Bureau of Prisons (BOP) can reach their own decisions about crediting service in another sovereign's correctional system, irrespective of whether Section 3584(a) authorizes federal district courts to embody such decisions in a judgment of convic-

---

[1] Under Texas law, sentences are to run concurrently unless they are "cumulated in the proper manner." Pet. 4-5 & n.1 (citation omitted).

[2] Petitioner received credit for time spent in jail while the state charges against him were pending, which reduced his sentence on the aggravated-assault conviction by 279 days. See Judgment of Conviction at 1, *State* v. *Brockman*, No. 8823D (Tex. 350th Dist. Ct. Taylor County Nov. 6, 2008).

tion and sentence. Consistent with that conclusion, this Court has denied numerous petitions raising the issue. Second, any need for this Court to resolve the circuit conflict is diminishing: the issue is under active re-examination in the courts of appeals, and in the meantime all federal prosecutors have been directed to urge sentencing courts not to impose consecutive-sentencing conditions of the sort at issue here.

1. As petitioner points out (Pet. 6-7), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, Section 3584(a) does not confer that authority. Nevertheless, further review is not warranted.

The first sentence of Section 3584(a) identifies two situations in which a district court may take into account other sentences: when "multiple terms of imprisonment are imposed on a defendant at the same time," and when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The second and third sentences establish the default presumptions that correspond to each of those two situations when the district court's order is silent on whether the sentences are to be consecutive or concurrent. A federal defendant who has not yet received, but may one day receive, a sentence in a separate state-court proceeding does not fall within either of the two situations specified in the first sentence of Section 3584(a). For that reason, in the government's view, the presumptions set out in the remainder of that subsection have no application to such a defendant.

The Second, Sixth, and Ninth Circuits have taken that view. *United States* v. *Donoso*, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1041 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492-493 (9th Cir. 1991); see also *United States* v. *Smith*, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that a federal district court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence). The Seventh Circuit has also held, for distinct reasons, that federal district courts lack authority to impose a sentence that runs consecutively to a future sentence. See *Romandine* v. *United States*, 206 F.3d 731, 737-738 (2000).

Four courts of appeals, including the court below, have taken the contrary view. Those courts have concluded either that federal district courts have the inherent authority to impose consecutive sentences and that Section 3584(a) does not withdraw it, see *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991); *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam), or that Section 3584(a)'s third sentence affirmatively permits terms of imprisonment to be run consecutively even before the second term of imprisonment has been imposed, see *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); *United States* v. *Ballard*, 6 F.3d 1502, 1507-1510 (11th Cir. 1993). If those interpretations were correct, however, Congress's specification, in the first sentence of Section 3584(a), of two situations in which the court has discretion to run sentences concurrently or consecutively would have been unnecessary: if courts had inherent authority to make consecutive-versus-concurrent deter-

minations, the limiting conditions in the first sentence would be beside the point, and if Section 3584(a)'s third sentence conferred authority to run sentences consecutively or concurrently in *all* cases in which sentences are imposed at different times, it would have made little sense for the first sentence to refer to a sentencing court's authority when the defendant has a prior undischarged term of imprisonment. Treating Section 3584(a) as an integrated whole avoids rendering its provisions partially superfluous.[3]

2. As the government has previously explained, however, the differences between the circuits' interpretations of Section 3584(a) have little practical impact. Accordingly, this Court has repeatedly declined to review the question presented. See *Valenciano-Espinoza* v. *United States*, 129 S. Ct. 2849 (2009) (No. 08-10524); *Smith* v. *United States*, 129 S. Ct. 2735 (2009) (No. 08-8118); *Garcia* v. *United States*, 129 S. Ct. 2734 (2009) (No. 08-6756); *Goodgion* v. *United States*, 129 S. Ct. 2734 (2009) (No. 08-5920); *Cortes-Beltran* v. *United States*, 129 S. Ct. 2380 (2009) (No. 08-8243); *DeLeon* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6055); *Bishop* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6175); *Dimas* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6165); *Martinez-Guerrero* v. *United States*, 129 S. Ct. 52 (2008) (No. 07-1362); *King* v. *United States*, 128

---

[3] That reading is confirmed by 18 U.S.C. 3584(b), which directs federal courts to consider the sentencing factors set out in 18 U.S.C. 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, see, *e.g.*, 18 U.S.C. 3553(a)(2)(B), (2)(C) and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined, and indeed may never be imposed.

S. Ct. 706 (2007) (No. 07-5307); *Lopez* v. *United States*, 128 S. Ct. 705 (2007) (No. 07-5060); *Cox* v. *United States*, 547 U.S. 1127 (2006) (No. 05-454); *Lackey* v. *United States*, 545 U.S. 1142 (2005) (No. 04-9286); *Martinez* v. *United States*, 543 U.S. 1155 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).[4]

a. The principal reason why the question does not require resolution by this Court is that under current law, the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sentence. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court can adjust the length of the state sentence (or suspend a portion of the sentence) to take into account the time the defendant has served or will serve in federal custody. See, *e.g.*, *Romandine*, 206 F.3d at 738 (explaining that the correct "answer" to the circuit conflict "does not matter, and the conflict is illusory").

Even when a defendant faces both federal and state sentences, the terms often do not overlap, simply because the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires. See generally *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (explaining primary jurisdiction over defendants prosecuted by separate sovereigns).

---

[4] The same question is also asserted by the pending petitions for writs of certiorari in *Farris* v. *United States*, No. 08-10700 (filed May 26, 2009); *Rollins* v. *United States*, No. 08-1453 (filed May 21, 2009); *Garcia* v. *United States*, No. 08-10721 (filed May 19, 2009); and *Brent* v. *United States*, No. 08-9319 (filed Mar. 16, 2009).

Even if, as here, the sovereign with primary jurisdiction permits the other sovereign to try and convict the defendant during that time, the other sovereign is not entitled to execute its sentence by immediately taking the defendant into custody.

Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two (including the court below) have mitigated the effect of that holding by suggesting that a federal judgment containing such a directive does not bar the state court from taking steps in the future to permit a concurrent sentence. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); see also *United States* v. *Douglas*, 569 F.3d 523, 527 n.2 (5th Cir. 2009) (defendant withdrew his challenge "because the state proceedings concluded and the state court has chosen to run his state sentence concurrently with the time he is serving in federal custody"). The other two circuits have not clearly spoken to the question whether a state court is so bound. The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of that case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. *Williams*, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, *Mayotte*, 249 F.3d at 799, but did not address the practical implementation of that statement, and in any event may be reconsidering its view of Section 3584(a) altogether, as discussed below. See pp. 12-13, *infra*; see also *United States* v. *Hayes*, 535 F.3d 907, 910 (8th Cir. 2008) (district court recognized that

any direction it might give would have no effect if "the state court decides to run its sentence concurrently, which they are free to do"), cert. denied, 129 S. Ct. 1983 (2009). Thus, even in the circuits that read Section 3584(a) to authorize a sentence consecutive to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

b. Petitioner contends that the correct interpretation of Section 3584(a) has an impact on his ability to ask the BOP to run his federal sentence concurrently with his state sentences now that they have been imposed. That contention is not sufficient to justify plenary review.

As petitioner states, "[o]ccasionally" a federal defendant who is also serving a state sentence will request that his federal sentence be deemed to have commenced at the same time as his state sentence and to run concurrently with it. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05, Designation of State Institution for Service of Federal Sentence* § 9(b)(4), at 5 (2003) (*Designation Program Statement*). The BOP has detailed protocols governing when to permit an inmate subject to a federal sentence to serve it in state custody. In making those decisions, the BOP gives considerable (though not dispositive) weight to the federal sentencing court's intent. See *id.* § 9(b), at 4-7; see also 18 U.S.C. 3621(b) (listing pertinent factors). Even if the sentencing court's intent is not embodied in the judgment, the BOP consults directly with the sentencing court by letter to ascertain its views on whether the sentences should be allowed to run concurrently. See *Designation Program Statement* § 9(b)(4)(c), at 6.

Petitioner notes (Pet. 8-10), however, that if the sentencing court *does* embody in the judgment its intent

that the defendant serve a consecutive sentence, the BOP will comply with that order. *Designation Program Statement* § 9(b)(4)(f), at 6-7. Petitioner contends that, as a result, the interpretation of Section 3584(a) has a concrete result on a federal prisoner whose sentencing judge wishes him to serve a consecutive sentence but whom the BOP would nonetheless permit to serve a concurrent sentence based on the other relevant factors.

That category is unlikely to include many inmates, and there is no indication that petitioner would fit into it. Even if petitioner made a request for designation to BOP and the consecutive-sentencing order did not exist, there is no indication that any of the other factors in 18 U.S.C. 3621(b) would warrant relief. To the contrary: one of the relevant factors is "any pertinent policy statement issued by the Sentencing Commission." 18 U.S.C. 3621(b)(5). Far from contradicting the sentencing court's view as expressed in its judgment, in this case the Sentencing Commission's guidance confirms it as to petitioner's state sentence for criminal mischief. Petitioner committed the offense of conviction while on probation for the criminal-mischief offense. PSR ¶¶ 37, 40, 77. His probation was subsequently revoked. See p. 3, *supra*. When, as here, "the defendant was on * * * state probation * * * at the time of the instant offense and has had such probation * * * revoked," the Sentencing Commission "recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation." Sentencing Guidelines § 5G1.3, comment. (n.3(C)). Nor can petitioner claim that his other state conviction warrants a concurrent sentence by virtue of being related to the instant offense; the aggravated-assault conviction was not related. PSR ¶¶ 44, 78; see Sentencing Guidelines

§ 5G1.3(b). As for the other factors, two of them encompass petitioner's criminal history and offense conduct, which led the district court to impose a sentence at the top of the advisory Guidelines range. See 18 U.S.C. 3621(b)(2) and (3). And the remaining factor—"the resources of the facility contemplated," 18 U.S.C. 3621(b)(1)—is unlikely to favor petitioner.

In short, even if the consecutive-sentencing order of which petitioner complains were stricken from his judgment of conviction, he would have only the most remote chance of persuading the BOP to permit him to begin serving his federal sentence before completing his state sentences. The same is true in the run of cases. Indeed, petitioner points to none where a similarly situated inmate was successful. That confirms why this issue lacks the sort of practical significance that would warrant this Court's intervention to resolve the circuit conflict.

3. In the government's view, the conflict over the interpretation of Section 3584(a) is best suited to resolution in the lower courts. Indeed, the courts of appeals that disagree with the government's interpretation (and petitioner's), including the court below, have begun to reconsider that stance. The government has taken active steps both to encourage that re-examination in the courts of appeals and to oppose consecutive-sentencing orders in the district courts. See pp. 12-17, *infra*. Accordingly, even if the question had some substantive impact that gave it continuing significance, review by this Court would be premature at this time.

a. Most recently, the Eighth Circuit granted a petition for rehearing en banc to re-examine the issue and will hear reargument in September 2009. See *United States* v. *Lowe*, 312 Fed. Appx. 836 (2009), reh'g en banc granted (Apr. 22, 2009). In that case, the government

has taken the position that the Eighth Circuit's precedent interpreting Section 3584(a) was wrongly decided.[5]

The Fifth Circuit, too, has signaled some willingness to re-examine the issue. That development is particularly significant, because in recent years the vast majority of cases presenting this issue have arisen in the Fifth Circuit.[6] Some months ago, the Fifth Circuit ordered briefing on the question whether its precedent on the issue "should be overruled or modified." *United States* v. *Garcia-Espinoza*, No. 08-10775 (Dec. 18, 2008). The government filed a brief agreeing that the court should overrule that precedent in an appropriate case, but noting that Garcia-Espinoza's case was a poor vehicle because his state sentence had already expired. The court of appeals accordingly denied a hearing en banc in that case, see Pet. App. 7a-8a, but it may identify another suitable case in which to reconsider the issue. Two of the three judges in *Garcia-Espinoza* advocated that the court do just that. *United States* v. *Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199, at *1 (5th Cir. May 15, 2009) (Owen, J., joined by Dennis, J., concurring) ("writ[ing] separately to recommend that the court

---

[5] Petitioner misstates the basis on which the government opposed rehearing en banc in *Lowe*. See Pet. 13. The government "agree[d] with Lowe that [the Eighth Circuit's precedent] should be overruled in an appropriate case," but explained that Lowe's was not a suitable vehicle because Lowe had not preserved an objection and could not prevail *on plain-error review*. Gov't Resp. to Pet. for Reh'g En Banc at 6, *Lowe*, *supra* (No. 08-2304).

[6] In the last five years, we are aware of only one case (*Cox*, *supra*) presenting the question that has reached this Court from any court of appeals other than the Fifth Circuit. (*Hayes*, *supra*, which came from the Eighth Circuit, presented a distinct question.)

re-examine en banc how we have previously construed 18 U.S.C. § 3584").

Despite that development, petitioner contends (Pet. 11-13) that there is in fact no realistic prospect that the Fifth Circuit will change its stance on this issue. Petitioner notes that the court of appeals denied a hearing en banc in *Garcia-Espinoza*, but that outcome is explained by the vehicle problem identified by the government. Likely for that reason, neither Judge Owen nor Judge Dennis called for an en banc ballot in *Garcia-Espinoza* itself, see Pet. App. 7a, even though both of them *subsequently* made clear their view that the Fifth Circuit should reconsider its precedent en banc, *Garcia-Espinoza*, 2009 WL 1362199, at *1-*2 (Owen, J., joined by Dennis, J., concurring).

Petitioner also notes that, even after raising the possibility of en banc consideration, the Fifth Circuit has affirmed sentencing judgments requiring that federal sentences be served consecutively with state sentences that had not yet been imposed. See Pet. 12 (citing *United States* v. *Farris*, 312 Fed. Appx. 598 (2009), petition for cert. pending, No. 08-10700 (filed May 26, 2009); *United States* v. *Scott*, 311 Fed. Appx. 703, cert. denied, 129 S. Ct. 2849 (2009); *United States* v. *Valenciano-Espinoza*, 311 Fed. Appx. 696, cert. denied, 129 S. Ct. 2849 (2009); *United States* v. *Maden*, 311 Fed. Appx. 695, cert. denied, 129 S. Ct. 2848 (2009); *United States* v. *Garcia*, 310 Fed. Appx. 707 (2009), petition for cert. pending, No. 08-10721 (filed May 19, 2009); *United States* v. *Jochum*, 310 Fed. Appx. 679, cert. denied, 129 S. Ct. 2782 (2009).

In each of the cases petitioner cites, however, the defendant affirmatively represented to the court of appeals that the issue was foreclosed by circuit precedent,

and did not ask the court of appeals to reconsider that precedent by petitioning for either initial hearing or rehearing en banc. Indeed, in many of those cases—including this case—the defendant affirmatively *asked* the court of appeals to affirm summarily. See Pet. C.A. Mot. for Summ. Disposition. Petitioner identifies no case since *Garcia-Espinoza*—and we are aware of none—in which the Fifth Circuit has denied a petition for rehearing en banc on this issue.

Moreover, petitioner is altogether incorrect in his suggestion (Pet. 13) that "the Government does not believe that an appropriate vehicle" for the Fifth Circuit to "resolv[e] the issue can ever exist." The government opposed rehearing en banc in *Garcia-Espinoza* because the issue had become moot: Garcia-Espinoza was effectively sentenced in the state case to time already served, and he was transferred shortly thereafter to federal custody to begin his federal sentence. We have explained that the correct interpretation of Section 3584(a) has little or no practical effect and therefore does not warrant plenary review by this Court; in *Garcia-Espinoza*, it no longer had *legal* effect, and the issue no longer presented *any* court with a live controversy.

The United States has already recommended to the Fifth Circuit that, when presented with an "appropriate case," the court should "overrule or modify [*Brown*] and hold that [Section] 3584(a) does not authorize a district court to order that the federal term of imprisonment be served consecutively to a yet-to-be-imposed state sentence." Gov't Br. at 7, *Garcia-Espinoza*, *supra* (No. 08-10775); see also pp. 12-13 & note 5, *supra* (noting the government's similar argument to the Eighth Circuit). Petitioner's suggestion (at 13) that the United States has failed to do so is inaccurate.

b. The government has also taken steps to ensure that federal prosecutors act consistently with the interpretation of Section 3584(a) discussed above. On January 8, 2009, the Executive Office for United States Attorneys informed all United States Attorneys' Offices that the Solicitor General, on behalf of the Department of Justice, had adopted that interpretation. In accompanying guidance, all federal prosecutors were directed to urge sentencing courts not to order that a sentence run consecutively to (or concurrently with) a yet-to-be-imposed sentence. In addition, except where circuit precedent (or the plain-error standard of review) dictates otherwise, the government will not defend an order that runs the federal sentence consecutively to a yet-to-be-imposed sentence.

As petitioner notes, the court below has continued to affirm sentences containing a consecutive-sentencing condition; all of those cases, however, involved sentences imposed before the Department of Justice distributed its guidance to federal prosecutors. Since that time, we understand that practice in the district courts has generally changed. As one example, the same district judge who imposed the allegedly erroneous sentencing condition in this case was also the sentencing judge in at least eight of the other cases that have reached this Court presenting the same issue—far more than any other individual judge. See also, *e.g.*, *United States* v. *Clinton*, No. 08-11007, 2009 WL 2512834 (5th Cir. Aug. 18, 2009) (same judge); *United States* v. *Collier*, No. 08-11071, 2009 WL 2513465 (5th Cir. Aug. 18, 2009) (same judge); *United States* v. *Diaz*, No. 08-10877, 2009 WL 1687805 (5th Cir. June 16, 2009) (same judge). We are informed by the supervisory Assistant United States Attorney for the relevant divisions of the Northern District of Texas

that the district judge has now abandoned his prior practice of imposing consecutive-sentencing conditions. Although we are informed that some district judges may continue to impose similar consecutive sentences, the practice appears to have substantially abated.

Accordingly, even if the courts of appeals were as intractably divided on the question presented as petitioner suggests, any significance that the issue may have had is diminishing. For that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney

AUGUST 2009

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

3

No. 08-1427

IN THE
Supreme Court of the United States

COREY ALAN BROCKMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
KEVIN JOEL PAGE
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor St., Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

JONATHAN D. HACKER
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 12

APPENDIX A
Sentences from United States District Court Judge Terry R. Means 1a

APPENDIX B
Sentences from United States District Court Judge John McBryde 13a

APPENDIX C
Sentences from United States District Court Judge David C. Godbey 17a

APPENDIX D
Sentences from United States District Court Judge Sam A. Lindsay 21a

APPENDIX E
Sentences from United States District Court Chief Judge Sidney A. Fitzwater 27a

APPENDIX F
Sentence from United States District Court Judge Barbara M.G. Lynn 34a

APPENDIX G
Sentence from United States District Court Judge Jorge A. Solis 36a

APPENDIX H
Sentence from United States District Court Judge Reed O'Connor 38a

TABLE OF CONTENTS
(continued)

Page

APPENDIX I
Sentences from United States District Court Judge Alia Moses Ludlum..... 40a

TABLE OF AUTHORITIES

Page(s)

CASES

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 3

Ponzi v. Fessenden,
258 U.S. 254 (1922) 2

United States v. Aguilar-Mendez,
No. 08-11204, 2009 WL 2512852
(5th Cir. Aug. 18, 2009) 9

United States v. Barron,
No. 09-10166, 2009 WL 2514011
(5th Cir. Aug. 18, 2009) 9

United States v. Clinton,
No. 08-11007, 2009 WL 2512834
(5th Cir. Aug. 18, 2009) 9

United States v. Collier,
No. 08-11071, 2009 WL 2513465
(5th Cir. Aug. 18, 2009) 9

United States v. Diaz,
No. 08-10877, 2009 WL 1687805
(5th Cir. June 16, 2009) 9

United States v. Farris,
312 F. App'x 836 (5th Cir. 2009) 9

United States v. Garcia,
310 F. App'x 707 (5th Cir. 2009) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Garcia-Espinoza,
325 F. App'x 380 (5th Cir. 2009) 9, 11

United States v. Garcia-Quiroz,
No. 09-10051, 2009 WL 2514139
(5th Cir. Aug. 18, 2009) 9

United States v. Jochum,
310 F. App'x 697 (5th Cir. 2009) .....

United States v. Lowe,
312 F. App'x 836 (8th Cir. 2009) 9

United States v. Maden,
311 F. App'x 695 (5th Cir. 2009) 9

United States v. Mancilla-Lopez,
No. 08-11092, 2009 WL 2512850
(5th Cir. Aug. 18, 2009) 9

United States v. Ordonez,
No. 08-10752, 2009 WL 1577689
(5th Cir. June 5, 2009) 9

United States v. Ortiz-Coca,
No. 08-11055, 2009 WL 2512847
(5th Cir. Aug. 18, 2009) 9

United States v. Rollins,
552 F.3d 739 (8th Cir. 2009) 9

United States v. Scott,
311 F. App'x 703 (5th Cir. 2009) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Solis,
No. 08-11216, 2009 WL 2512854
(5th Cir. Aug. 18, 2009) 9

United States v. Valenciano-Espinoza,
311 F. App'x 696 (5th Cir. 2009) 9

STATUTES

18 U.S.C. § 3584(a) 1

18 U.S.C. § 3621(b)(1) 5

18 U.S.C. § 3621(b)(2) 5

18 U.S.C. § 3621(b)(3) 4

ADMINISTRATIVE AUTHORITY

Federal Bureau of Prisons, U.S. Dep't of
Justice, Program Statement No.
5160.05, *Designation of State
Institution for Service of Federal
Sentence* (Jan. 16, 2003) 5

REPLY BRIEF FOR PETITIONER

The Government's opposition concedes virtually every element of the case for certiorari. In particular, the Government recognizes that "the courts of appeals are divided"—four to four—"over whether a district court has the authority to direct that a sentence run consecutively to a state sentence that has not yet been imposed." Opp. 4, 5-7. It "agrees with petitioner that district courts lack such authority under 18 U.S.C. 3584(a)." *Id.* at 4. It acknowledges that the Fifth Circuit has denied a petition to review this issue en banc. *Id.* at 13. And it does not deny that the order below *requires* petitioner to serve *two* additional years of imprisonment that the Bureau of Prisons (BOP) would otherwise have discretion to eliminate. *Id.* at 10-11.

The Government nonetheless opposes review on the ground that the question presented is not important. Opp. 8-12. But the Government's own actions demonstrate otherwise. The issue is important enough for the Executive Office of the United States Attorneys to issue specific advice to every U.S. Attorney on how to address it. *Id.* at 15. It is important enough that every U.S. Attorney must explicitly urge every district court in every case that it should not engage in the challenged practice. *Id.* at 16. And it is important enough that, in "appropriate case[s]," the Government will advise four circuits to grant rehearing en banc to reverse their decisions on the issue. *Id.* at 12. Despite all that, the Government turns around here and insists that the issue is not important enough for this Court, in a single (and plainly suitable) case, to simply bring an end to this

concededly unlawful practice. The Government's position not only lacks merit—it lacks credibility.

1. The Government argues that unlawful consecutive sentencing orders have no practical impact because state courts can circumvent them by cutting the length of the state sentence by the amount of the federal sentence. Opp. 8. But the Government fails to explain why state courts faced with federal court consecutive sentence "orders" would not feel either bound by them or compelled by considerations of comity to follow them.

To the extent that state courts try to circumvent the illegal orders, moreover, the result is unseemly gamesmanship that damages federal-state relations. As the Government views current law and procedure in four circuits, a federal court essentially attempts to trick a state court into ordering a consecutive sentence with an "order" that, while binding in appearance, actually lacks legal effect. The state court should then respond, the Government submits, by invoking available state-law means to circumvent the meaningless order. Opp. 8-9. That approach is patently incompatible with this Court's call for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in sentencing. *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922).

The Government's proposed tactic for defeating illegitimate federal court orders also cannot work when state law imposes a mandatory minimum sentence. And cutting the state sentence by the length of the federal sentence would entirely defeat state sentencing objectives when the federal sentence is subsequently vacated because of an error in the pro-

ceedings or reduced because a defendant cooperated with federal authorities.

A system under which a federal court issues "orders" that are not binding also cannot be reconciled with the requirements of Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). And even if such ersatz orders are consistent with Article III, it nevertheless denigrates federal judicial power for federal courts to issue orders that can be freely ignored. Those harmful effects on the administration of justice easily justify review of a 4-4 circuit split on an issue on which the Government has confessed error.

2. This case illustrates an additional serious consequence of consecutive sentencing orders that heightens the need for review: they illegally deprive persons like petitioner of the opportunity to petition the BOP to make their federal sentences concurrent with the time they have served in state prisons. The effect on petitioner is palpable. The unlawful order here requires petitioner to serve two extra years of imprisonment that the BOP would otherwise have had discretion to eliminate. And that same effect is experienced by the entire class of persons who serve their state sentences before being transferred to federal custody.

The Government argues that this effect is no cause for concern because not many inmates would likely obtain relief from the BOP. Opp. 11. But that is pure speculation; the Government offers not a shred of evidence to support it. In fact, it is impossible to know how many defendants would receive a lower sentence. What can be known is that a con-

secutive sentence order unlawfully deprives every person who serves his state sentence first of the opportunity to persuade the BOP to credit his time served against his federal sentence. That systemic denial of the opportunity to obtain a reduced sentence requires correction.

The fallacy in the Government's position is illustrated by the following example. Suppose courts throughout the country were imposing two-year mandatory minimum sentences based on what the government conceded was a misreading of federal law. In that situation, it would be impossible to know how many defendants would receive sentences of less than 24 months if the district courts had been afforded the discretion to impose them. Yet that uncertainty could not possibly justify tolerating the continuance of that illegal practice. The same is true here.

The Government also asserts that petitioner himself is unlikely to obtain relief. *Id.* at 11-12. But that too is pure speculation. There is no way to know what the BOP would do if it were permitted to consider petitioner's application. The Government's one-sided account is no substitute for the BOP's consideration of all the relevant facts. *Id.* at 10-11.

For example, in considering petitioner's "history and characteristics," 18 U.S.C. § 3621(b)(3), the BOP would not be limited to the government's slanted account; it would also learn that (i) petitioner's mother abandoned him when he was 12, placing him in a boys' "ranch," Petitioner's Presentence Report (PSR) ¶ 49; (ii) petitioner was sexually abused for the next five years by a man who eventually received a life

sentence for his crimes, *id.* ¶ 50; (iii) petitioner suffered from severe depression at the time of his federal offense of possessing a firearm as a convicted felon, *id.* ¶¶ 60-63; (iv) petitioner "clearly demonstrated acceptance of responsibility for his [federal] offense," *id.* ¶ 24; and (v) petitioner has sought and received medication to treat his "Major Depressive Disorder," *id.* ¶ 64. In assessing "the nature and circumstances of petitioner's offense," 18 U.S.C. § 3621(b)(2), the BOP would consider many of those same factors. It would also take into account that petitioner's federal offense involved "no identifiable" individual victim. PSR ¶ 21.

The Government's account is not only one-sided, but premature. In making its determination, the BOP would certainly consider how petitioner's confinement in state prison affected his suitability for release, a determination that cannot be made until petitioner completes his state sentence in 2011. BOP Program Statement 5160.05, *Designation of State Institution for Service of Federal Sentence* § 8(a) (Jan. 16, 2003). Another factor that cannot be determined until then is whether the resources of available federal facilities would argue in favor of petitioner's release. 18 U.S.C. § 3621(b)(1).

In arguing that petitioner would have only a slight chance of obtaining relief, the Government claims that the BOP would not credit the time petitioner served on his mischief offense. Opp. 11. But even if that were so, it would not affect petitioner's request for credit for the time served on his assault conviction. And that time is sufficient by itself to entirely eliminate petitioner's two-year federal sentence.

With respect to the time served for assault, the sole argument the Government makes is that petitioner's criminal history points would count against him. *Id.* at 12. That argument not only ignores all the other relevant circumstances discussed above; it also ignores the circumstances of petitioner's criminal history. The criminal history relied on by the Government consists of two offenses petitioner committed at age 18, the year he left the ranch at which he was sexually abused. One was for shoplifting a camera, pregnancy test, and photo paper refill; the other was for shooting at a building's windows with "a BB gun." PSR ¶¶ 37-38. It is implausible that the BOP would view those two relatively minor offenses that petitioner committed when he was 18 as precluding release if it were disposed to release petitioner based on other factors. And that does not even account for the possibility that those offenses may already have been factored into petitioner's sentence for assault, a circumstance that would make them even less relevant to the BOP's determination.

3. The only other argument the Government offers against review is that its own efforts to advise district courts not to impose consecutive sentences and to recommend review en banc in four circuits will be sufficient to resolve the issue. Even if the Government's efforts were ultimately successful, it could only be after an enormous expenditure of resources and extended period of time. There is no reason to prefer that drawn-out, resource-intensive solution to the much more efficient one of a single decision by this Court ending the practice. Why the Government objects to the latter approach is mystifying.

Furthermore, the Government's efforts in the district courts have been an embarrassing failure. The Government asserts that since it advised U.S. Attorneys' Offices that they should urge district courts not to impose consecutive sentences, it "understands" the district courts' practice of sentencing defendants unlawfully has "generally changed." Opp. 16. In support of that generalization, the Government offers the example of a single judge who has changed his practice. *Id.* at 16-17. The very fact that the Government can cite only one judge who has changed his practice is reason enough to cast serious doubt on the Government's otherwise unsubstantiated generalization.

And the actual *evidence*—as opposed to the Government's "understanding"—is alarming. After a limited review, we have found that since the Government began advising district courts not to impose consecutive sentences, at least *nine different district court judges in Texas alone* have continued to impose these illegal consecutive sentences. *See* App., *infra*, at 1a-53a.

That is hardly surprising. District court judges who view consecutive sentences as a wise and permissible practice are unlikely to change their view based on a prosecutor's say so. As one district judge stated colorfully in response to a prosecutor's objection to a consecutive sentence: "I don't care. I'm well aware of that U.S. Attorney policy; and I haven't li[sten]ed to it before, especially because statutorily I have the authority to do so." App. at 42a.

This illegal practice persists for another reason. While the Government certainly may desire and ex-

pect that all U.S. Attorneys would follow national advice, the unfortunate reality, as the Government well knows, is otherwise. It will come as no surprise to anyone experienced with the relationship between the Department of Justice and U.S. Attorneys that since the Department provided its guidance, several prosecutors have simply ignored it, and have stood silently by while district court judges imposed illegal consecutive sentences. *See* App. at 7a-8a, 46a-47a, 50a-51a.

The real lesson of the recent district court experience is not that the practice is abating, as the Government asserts, but rather that numerous district court judges are continuing to engage in this practice and will continue to do so until a higher court directs them to stop. And these judges, unlike the Government, obviously do not believe they are doing something with little practical impact. They persist in this practice despite the Government's objections because they believe the practice results in longer sentences.

4. While the Government's district court effort has been a dismal failure, its en banc effort has not even gotten off the ground. The Government insists that it has "taken active steps" to encourage en banc review of an "appropriate case" (Opp. 12-13), but that is true only if "active steps" means "no steps at all." Since the issuance of its January advice to U.S. Attorneys, the Government has had at least 20 opportunities to recommend either initial consideration

or rehearing en banc. The Government *has not done so once.*[1]

The Government chafes at petitioner's observation that it is by now clear that the Government will never recommend en banc review. Opp. 15. What is telling, however, is that the Government still refuses to describe a single situation in which it would recommend en banc review. There is a reason for that. The Government believes every real case falls into one of two categories: (1) cases where the state court might somehow countermand the federal court's consecutive sentence order, and (2) cases where BOP might give the same consecutive sentence anyway.

---

[1] *See United States v. Barron*, No. 09-10166, 2009 WL 2514011 (5th Cir. Aug. 18, 2009); *United States v. Aguilar-Mendez*, No. 08-11204, 2009 WL 2512852 (5th Cir. Aug. 18, 2009); *United States v. Mancilla-Lopez*, No. 08-11092, 2009 WL 2512850 (5th Cir. Aug. 18, 2009); *United States v. Garcia-Quiroz*, No. 09-10051, 2009 WL 2514139 (5th Cir. Aug. 18, 2009); *United States v. Clinton*, No. 08-11007, 2009 WL 2512834 (5th Cir. Aug. 18, 2009); *United States v. Ortiz-Coca*, No. 08-11055, 2009 WL 2512847 (5th Cir. Aug. 18, 2009); *United States v. Solis*, No. 08-11216, 2009 WL 2512854 (5th Cir. Aug. 18, 2009); *United States v. Collier*, No. 08-11071, 2009 WL 2513465 (5th Cir. Aug. 18, 2009); *United States v. Diaz*, No. 08-10877, 2009 WL 1687805 (5th Cir. June 16, 2009); *United States v. Ordonez*, No. 08-10752, 2009 WL 1577689 (5th Cir. June 5, 2009); *United States v. Garcia-Espinoza*, 325 F. App'x 380 (5th Cir. 2009); *United States v. Lowe*, 312 F. App'x 836 (8th Cir. 2009) (plain error); Pet. App. 4a-5a; *United States v. Farris*, 312 F. App'x 698 (5th Cir. 2009); *United States v. Scott*, 311 F. App'x 703 (5th Cir. 2009); *United States v. Valenciano-Espinoza*, 311 F. App'x 696 (5th Cir. 2009); *United States v. Maden*, 311 F. App'x 695 (5th Cir. 2009); *United States v. Garcia*, 310 F. App'x 707 (5th Cir. 2009); *United States v. Jochum*, 310 F. App'x 697 (5th Cir. 2009); *United States v. Rollins*, 552 F.3d 739 (8th Cir. 2009).

And the Government regards both categories as inappropriate vehicles for review.

The chimerical nature of the Government's en banc effort is confirmed by the conspicuous absence of any statement in its guidance to U.S. Attorneys that an appropriate case should be identified for en banc review. And in the two court of appeals cases in which the Government promised that it would someday recommend en banc review in an appropriate case—just not that one, as always—the Government simultaneously stated that the issue has "little practical impact." Response of the United States to Pet. for Hearing En Banc, *United States v. Garcia-Espinoza*, No. 08-10775, at 18 (5th Cir. Mar. 4, 2009); *see* Response of the United States to Pet. for Reh'g En Banc, *United States v. Lowe*, No. 08-2304, at 8 (8th Cir. Apr. 1, 2009) (arguing consecutive-sentence order had "no practical effect" given BOP discretion). It is difficult to see how the Government can simultaneously contend in an en banc submission that an issue has little practical impact and yet satisfies the "exceptional importance" standard for en banc review. Fed. R. App. P. 35(a)(2).

As one would expect given the Government's practice, two circuits, the Fifth and the Eighth, have denied en banc review. *See* Pet. App. 7a-8a (*United States v. Garcia-Espinoza*, No. 08-10775); Order, *United States v. Lowe*, No. 08-2304 (Aug. 31, 2009). The Government asserts both cases involved vehicle problems. But at least in the case of the Fifth Circuit, that assertion is meritless. There, the Government claimed the issue was moot because the defendant had begun to serve his federal sentence. But as the two judges on the panel who addressed the Gov-

ernment's mootness claim made clear, the case was not moot, because if the court vacated the defendant's consecutive sentence, he could have sought credit for his state sentence from the BOP. *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (Owen, J., concurring). That case, in other words, was no more moot than this one, which is undeniably live. The only reasonable explanation for the denial of en banc is that the Fifth Circuit did not view the issue as sufficiently important to warrant such consideration. That is consistent with the Government's insistence in its brief in that case that the issue has "little practical impact."

It is time for this shell-and-pea game to end. Criminal defendants with vital liberty interests at stake should not have to file a continuous stream of futile en banc petitions in the courts of appeals, all of which will be opposed by the Government, before this Court finally terminates this unlawful practice.

5. Finally, the Court's prior denials of certiorari on this issue (Opp. 7-8) are irrelevant here. Many occurred before the Government confessed error on the issue. Others involved real vehicle issues, such as defendants who failed to object to the illegal sentence in the district court. None involved a defendant, like petitioner here, who could demonstrate in stark terms that he would directly and materially benefit from a favorable decision by this Court. The combination of a 4-4 circuit split, a concededly illegal practice, the harmful effects on the administration of justice of allowing such a practice to persist, and a person condemned to serve two additional years of imprisonment that could potentially be avoided makes review imperative now.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either set for plenary briefing and argument or summarily reversed.

Respectfully submitted,

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
KEVIN JOEL PAGE
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF
TEXAS
819 Taylor St., Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

JONATHAN D. HACKER
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

September 9, 2009

APPENDIX

APPENDIX A

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
v.	Case number: 4:08-CR-098-Y (28)
JIMMY H. PORTILLO	U.S. marshal's no.: 38133-177 J. Michael Worley, assistant U.S. attorney Paul Snell, attorney for the defendant

******

Sentence imposed August 10, 2009

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed August 11, 2009

IMPRISONMENT

The defendant, Jimmy H. Portillo, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 28 months on each of counts ninety-six, ninety-seven, and ninety-eight of the ninety-eight count superseding

indictment. The sentence imposed in each count shall run consecutively to the others, for an aggregate term of imprisonment of 84 months. This sentence shall be served consecutively to any sentence imposed by Tarrant County, Texas, Criminal District Court No. 2, in cause no. 0502094.

The defendant is remanded to the custody of the United States marshal.

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
v.	Case number: 4:08-CR-010-Y (01)
RAFAEL RODRIGUEZ-DURAN	U.S. marshal's no.: 38110-177 Joshua Burgess, assistant U.S. attorney Matthew Kyle Belcher, attorney for the defendant

******

Sentence imposed April 13, 2009

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed April 14, 2009

IMPRISONMENT

The defendant, Rafael Rodriguez-Duran, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 57 months on count one of the one-count indictment. The sentence imposed in this case shall run

consecutively to any sentence imposed in Case Nos. 19858OR, 198579R, 197989D, and 196364D in Criminal District Court No. 2, Tarrant County, Texas

The defendant is remanded to the custody of the United States marshal.

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
v.	Case number: 4:09-CR-030-Y (01)
ELIZZ GARCIA	U.S. marshal's no.: 38222-177 Robert A. Klinck, assistant U.S. attorney Peter Michael Fleury, attorney for the defendant

******

Sentence imposed August 10, 2009

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed August 11, 2009

IMPRISONMENT

The defendant, Elizz Garcia, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 60 months on count one of the one-count information. The sentence shall run consecutively to any sentence imposed by the State

of Texas arising out of the violation(s) of the law for which she was arrested on July 12, 2009, by the Irving, Texas, police department (e.g., forgery of a financial instrument and/or identity theft).

The Court recommends that the defendant be placed in the Institution Residential Drug Abuse Treatment Program, if qualified.

The defendant is remanded to the custody of the United States marshal.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA
CRIMINAL ACTION NO. 4:09-CR-030-Y
V.

Fort Worth, Texas
ELIZZ GARCIA August 10, 2009

TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

******

THE COURT: Thank you.

The sentence is amended to read 60 months. This sentence shall run consecutively to any sentence imposed by the state of Texas arising out of the violations of the law for which she was arrested on July 12, 2009 by the Irving, Texas Police Department, for instance, forgery of a financial instrument and/or identity theft. I recommend that Ms. Garcia be enrolled in the comprehensive drug treatment program offered by the Bureau of Prisons.

******

I have now stated the sentence. I call upon the parties to indicate any legal reason why sentence may not be imposed as stated?

MR. KLINCK: None from the government, Your Honor.

MR. FLEURY: We have no objection, Your

Honor. I didn't know if I heard whether you made the recommendation for RDAP or whether you decided not to do that.

THE COURT: I did, I believe.

MR. FLEURY: Okay.

THE COURT: If I didn't, I do now.

MR. FLEURY: I apologize.

THE COURT: That's all right.

Sentence is then imposed as stated.

Ms. Garcia, you have the right to appeal the sentence that I have imposed. You also -- is there something else?

MR. FLEURY: Yes, there is, Your Honor. Again, I guess I wasn't listening carefully enough.

We always object, and we object in this case to the Court running this case consecutive to an as yet imposed state court sentence.

THE COURT: Right. Your objection is overruled.

Ms. Garcia, you have the right to appeal the sentence that I have imposed. You also have the right to apply for leave to appeal in forma pauperis if you're unable to pay the cost of the appeal.

Do you have any questions, ma'am?

DEFENDANT: No, Your Honor.

THE COURT: You're remanded to the custody of the United States Marshal. Good luck to you.

(End of proceedings, 11:00 a.m.)

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
v.	Case number: 4:08-CR-127-Y (1)
ERIC WAYNE BARRON	U.S. marshal's no.: 38056-177 Shawn Smith, assistant U.S. attorney Christopher Curtis, attorney for the defendant

******

Sentence imposed January 26, 2009

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed January 27, 2009

IMPRISONMENT

The defendant, Eric Wayne Barron, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 29 months on count one of the one-count indictment. The sentence imposed shall run consecutively to any sentence

imposed by the State of Texas in case numbers 1090653 and 1090987 in the 213th Judicial District Court, Tarrant County, Texas.

The Court recommends that the defendant be placed in the Institution Residential Drug Abuse Treatment Program, if qualified.

It is ordered that the psychological evaluation of the defendant prepared by Jim Womack, Ph. D., for the use of the Court in this case, be provided to the Bureau of Prisons, immediately after the judgment and commitment order is signed and entered.

The defendant is remanded to the custody of the United States marshal.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	(	Number 4:08-CR-127-Y
Plaintiff,	(	
vs.	(	
	(	
ERIC WAYNE BARRON	(	January 26, 2009
Defendant	(	

Sentencing
Before the Honorable Judge Terry Means

******

It is the judgment of the Court that the Defendant Eric Wayne Barron in Cause Number 4:08-127-Y be committed to the custody of the Federal Bureau of Prisons for a period of twenty-nine months. This shall run consecutively to the sentence imposed by the State of Texas in Case Numbers 1090653 and 1090987 in the 213th Judicial District Court of Tarrant County.

******

MR. SMITH: The government objects according to department policy to any consecutive nature of the sentence to any pending state matter and also the sentence below the guideline range.

THE COURT: Your policy is objection to a consecutive sentence to a state matter?

MR. SMITH: Yes, your Honor. That is a fairly new Department of Justice policy.

THE COURT: Could you forward me a copy of that? I wasn't aware of that.

MR. SMITH: I believe Fifth Circuit said it's okay.

THE COURT: If it's a state case but not federal.

MR. CURTIS: Your Honor, I needed to object on the same grounds. There is an issue before the Fifth Circuit. I believe it's going up to the Supreme Court on the constitutionality of ordering an unimposed state sentence to run consecutively to an imposed federal sentence.

THE COURT: Yeah, but I'm not ordering the state case should run consecutive to this. I'm ordering this run consecutive to it. I'll be interested in seeing that policy and following the course of that case. I wasn't aware that was on appeal. Objections are overruled. Sentence is imposed as stated.

APPENDIX B

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	§	Case Number: 4:08-CR-147-A(04)
v.	§	
JOSHUA LOHMANN	§	

JUDGMENT IN A CRIMINAL CASE

******

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months. The sentence shall run consecutively to any sentence imposed by Tarrant County Criminal District Court No. 2, in Case No. 1109508D, and any sentence imposed in the 371st District Court of Tarrant County in Case No. 1005000D. The sentence shall run concurrently to any sentence imposed in Tarrant County Criminal District Court No. 2, in Case Nos. 1109507D and 1107350D.

******

Signed this the 3rd day of March, 2009.

/s/ John McBryde
JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	§	Case Number: 4:08-CR-147-A(01)
v.	§	
CORY MITCHEL	§	

JUDGMENT IN A CRIMINAL CASE

******

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 170 months. The sentence shall run consecutively to any sentence imposed by Tarrant County Criminal District Court No. 3, in Case Nos. 1121882 and 1122144; and consecutively to any sentence imposed in Tarrant County Criminal District Court No. 10, in Case No. 1115727.

The defendant is remanded to the custody of the United States Marshal.

******

Signed this the 3rd day of March, 2009.

/s/ John McBryde
JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA,	§	Case Number: 4:08-CR-147-A(03)
v.	§	
MELINDA BARNEY	§	

JUDGMENT IN A CRIMINAL CASE

******

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 136 months. The sentence shall run consecutively to the sentence imposed in the 266th District Court of Erath County in Case Nos. CR12745 and CR12832, and any sentence imposed in the 355th District Court of Hood County in Case No. CR10673.

******

Signed this the 29 day of May, 2009.

/s/ John McBryde
JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

JEROME LORENZO WILLIAMS

JUDGMENT IN A CRIMINAL CASE

Case number: 3:09-CR-033-n (01)

USM Number: 38531-177

Douglas A. Morris
Defendant's Attorney

******

JULY 6, 2009

/s/ David C. Godbey
Signature of Judge

U.S. DISTRICT JUDGE
DAVID C. GODBEY
Name and Title of Judge

7/10/09
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

72 (Seventy Two) Months on Counts 1, 2 and 3 to run concurrently. This sentence shall be served consecutively to any sentence imposed in Case No. CR07-1472-AB pending in Chatham County Superior Court in Savannah, Georgia.

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

DERRICK LAMONT MONEY

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-327-N(01)

USM Number: 38454-177

Sam Ogan
Defendant's Attorney

******

June 15, 2009

/s/ David C. Godbey
Signature of Judge

U.S. DISTRICT JUDGE
DAVID C. GODBEY
Name and Title of Judge

6/23/09
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to

United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **210 (Two Hundred Ten) Months on counts 1 and 2 to run concurrently. This sentence shall run consecutively to state cases MB0754777, Case No. MB0763480, Case No. F-0687177, Case No. F-0771609 and Case No. F-0738389. The sentence shall be served concurrently to state Case No. F-085598, Case No. F-0855984, Case No. F-0861048 and Case No. F-0861049.**

APPENDIX D

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

COLBY LAWRENCE RICHARDSON

JUDGMENT IN A CRIMINAL CASE

Case number: 3:09-CR-019-L(01)

USM Number: 38565-177

Charles M. Bleil
Defendant's Attorney

******

/s/ Sam A. Lindsay
Signature of Judge

Sam A. Lindsay

United States District Judge
Name and Title of Judge

August 18, 2009
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to

United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Fifteen (15) months on Count I and Sixty (60) months on Count 2, to be served consecutively to each other, for a total term of Seventh-five (75) months. Count I shall run concurrently to any sentence received in Case No. F-0839224, which is pending in the 292nd Judicial District Court, Dallas, Texas. Count 2 shall run consecutively to any sentence imposed in the State case.**

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

BILLY REED

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-301-L(03)

USM Number: 38466-177

Dean A. Sanders
Defendant's Attorney

******

/s/ Sam A. Lindsay
Signature of Judge

Sam A. Lindsay

United States District Judge
Name and Title of Judge

July 6, 2009
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant

is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Eighteen (18) months. This sentence shall run consecutively to any State Court sentence that might be imposed.**

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

JUAN ANTONIO GONZALEZ-ESCOBEDO

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-336-L (01)

USM Number: 38436-177

Charles M. Bleil
Defendant's Attorney

******

/s/ Sam A. Lindsay
Signature of Judge

Sam A. Lindsay

United States District Judge
Name and Title of Judge

March 3, 2009
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant

is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Seventy (70) months. The sentence shall run consecutively to the Defendant's cases of probation revocation for Aggravated Assault, Cases No. F-0560893, pending in Dallas County Criminal District Court 7, Dallas, Texas; and Unlawful Carrying of a Weapon Case No. MA0862175, pending in Dallas County Criminal Court 1, Dallas, Texas.**

APPENDIX E

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

JAMES GAYFORD

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-350-D(01)

USM Number: 38483-177

Charles M. Bleil
Defendant's Attorney

******

JULY 2, 2009

/s/ Sidney A. Fitzwater
Signature of Judge

SIDNEY A. FITZWATER
CHIEF JUDGE
Name and Title of Judge

July 6, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be

imprisoned for a total term of: **eighty-four (84) months.**

It is ordered that the sentence shall run concurrently with any sentence imposed in Case No. F-0825494 by Dallas County Criminal District Court No. 5, and shall run consecutively to any sentences imposed in Case Nos. CR-70579-F, 72-042307, and 72-042313 by the 18th Judicial District Court of Point Coupce Parish, Louisiana.

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

TRACY JOHNSON

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-172-D(01)

USM Number: 38385-177

Douglas A. Morris
Defendant's Attorney

******

/s/ Sidney A. Fitzwater
Signature of Judge

SIDNEY A. FITZWATER
CHIEF JUDGE
Name and Title of Judge

June 15, 2009
Date

******

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **fifty-one months on counts 1 and 4**

It is ordered that the sentences on counts 1 and 4 shall run concurrently with one another, except as to the mandatory special assessments, which shall run consecutively.

It is ordered that the sentence in this case shall run consecutively to any sentence that may be imposed in Case Nos. F-0872180, F-0871918, and F-0852631 by the 204th Judicial District of Dallas County, Texas.

In The United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA Government,	3:08-CR-172-D
VERSUS	DALLAS, TEXAS
TRACY JOHNSON Defendant.	JUNE 12, 2009

TRANSCRIPT OF SENTENCING

BEFORE THE HONORABLE SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

FOR THE GOVERNMENT:	JOHN BOYLE HECTOR VALLE UNITED STATES DEPARTMENT OF JUSTICE NORTHERN DISTRICT OF TEXAS

******

It is ordered that the sentence in this case shall run consecutively to any sentence that may be imposed in case numbers F0872180, F0871918, and F0852631 by the 204th judicial District court of Dallas county, Texas.

******

THE COURT: Okay. Mr. Morris, do you have anything further at this time?

MR. MORRIS: Yes, Your Honor.

It's my understanding that there's same fluidity, if you will, in the law, in the consecutive versus concurrent arena, and I'm not sure about it enough to tell you right off the top of my head, but I'm going to go ahead and object to the consecutive imposition of the sentence, just because I'm not quite certain what the law is on that, just so I protect Mr. Johnson's right in that area.

THE COURT: I'll note your objection and overrule it.

I think, Mr. Morris, what you may be thinking of is there -- refers to ordering a federal sentence served consecutively to another federal sentence, as opposed to a state sentence, where I think the law is still settled.

But in any event, you have the right to object and you're being careful to object --

MR: MORRIS: Thank you.

THE COURT: -- and I overrule you.

MR. MORRIS: The only other thing I would ask

is that I -- I noted in regards to the -- the assertions of ineffective assistance, and I did not want to present anything today, I did not want that to seem as a waiver for perpetuity purposes. In the case of we're asked to answer those questions on appeal or habeas motion or something at that point, I wouldn't want it to be seeming like our office has waived our rights forever into answering those assertions.

APPENDIX F

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

MANUEL MENDOZA

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-285-M (01)

USM Number: 38419-177

John M. Nicholson
Asst. Federal Public Defender
Defendant's Attorney

******

May 15, 2009

/s/ Barbara M.G. Lynn
Signature of Judge

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

May 21, 2009
Date

******

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **ONE HUNDRED AND TWENTY (120) MONTHS. This term of imprisonment shall run concurrent with any sentence received in the following Case Nos. F-0855911, F-0855912 F-0855913, which are all pending in the 283rd Judicial District Court in Dallas, TX, and are related to the instant offense. This term of imprisonment shall run consecutive with any sentence received in the following Case Nos.: F-0773833, which is pending in the 283rd Judicial District Court in Dallas, TX, and any sentence received in Case No.: F-945579 and F-0159047, as these cases are unrelated to the instant offense.**

APPENDIX G

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

QUINTON DAUGHTRY

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-197-P (01)

USM Number: 38282-177

Michael Todd, Esq.
Defendant's Attorney

******

/s/ Jorge A. Solis
Signature of Judge

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 11, 2009
Date

******

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors

set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **SIXTY-FOUR (64) MONTHS to run consecutive to any sentence imposed in state Case Nos. MA0664277, F-0714527 and F-0755750.**

APPENDIX H

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA,

v.

EDGAR SOSA-LOPEZ

JUDGMENT IN A CRIMINAL CASE

Case number: 3:08-CR-310-O (01)

U.S. Marshal's No.: 38431-177
Cara Foos Pierce, Assistant U.S. Attorney
Laura Harper, Attorney for the Defendant

******

Sentence imposed February 26, 2009,

/s/ Reed O'Connor
REED O'CONNOR
DISTRICT JUDGE

Signed February 27, 2009

IMPRISONMENT

The defendant, EDGAR SOSA-LOPEZ, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of EIGHT (8) months on Count One of the One-Count Indictment filed on October 22, 2008. This sentence is to run consecutive to any sentence the defendant may receive in the Possession of a Controlled Substance case pending in Carrollton, Texas.

The defendant is remanded to the custody of the United States Marshal.

APPENDIX I

United States District Court

WESTERN DISTRICT OF TEXAS
Del Rio Division

UNITED STATES OF AMERICA

DR-08-CR-715

v.

DEL RIO, TEXAS
MARCH 12, 2009

ISRAEL VARGAS-SOLIS

SENTENCING

BEFORE THE HONORABLE ALIA MOSES LUDLUM

UNITED STATES DISTRICT JUDGE

******

FOR THE UNITED STATES OF AMERICA:
UNITED STATES ATTORNEY'S OFFICE
KATHRYN RISINGER
Assistant U.S. Attorney
Third Floor, U.S. Courthouse
111 East Broadway
Suite 300
Del Rio, Texas 78840

FOR THE DEFENDANT:
FRANK MORALES

OFFICE OF THE FEDERAL PUBLIC DEFENDER
2205 Veterans Boulevard
Suite A-2
Del Rio, Texas 78840

******

It is therefore the Order and the Judgment of the Court that the Defendant Israel Vargas-Solis is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months with credit for the time he has been in custody since June 28th of 2008; that the sentence is to run consecutively to the two pending state cases that have warrants outstanding; that upon release from imprisonment, Mr. Vargas, you will be placed on a term of supervised release of three years; that while on supervised release you shall comply with all the standard conditions of supervision adopted by the Court on May 27th, 2004.

One of your conditions is that you are not to return to the United States illegally. Mr. Vargas, for your own good do not return to the United States illegally for any reason at anytime at any place. Do you understand?

THE DEFENDANT: Yes.

THE COURT: The Court finds that there is insufficient evidence to indicate that the defendant has the ability to pay a fine; therefore, no fine will be imposed. However, the Court will Order that the defendant shall pay to the United States a special assessment of $100 which shall be due immediately. The Court will Order that the Presentence Report

and all related documents be sealed and be made part of the record for appellate purposes. And I advise you, Mr. Vargas, you do have the right to appeal your sentence. Anything further, Ms. Risinger?

MS. RISINGER: Your Honor, the Government simply objects to the running of the sentences consecutively --

THE COURT: I don't care.

MS. RISINGER: -- to the State cases, just for the record.

MR. MORALES: I join the objection, Your Honor.

THE COURT: I don't care. I'm well aware of that U.S. Attorney policy; and I haven't licensed to it before, especially because statutorily I have the authority to do so.

MS. RISINGER: I understand.

THE COURT: And this is not saying that the State will do it. I don't know what the State is going to do. They might decide to run theirs concurrently, so I don't know.

Okay. Mr. Morales, do you need to speak to your client for a moment?

MR. MORALES: I do.

THE COURT: Okay. Mr. Vargas, just have a seat so your attorney can speak to you.

MR. MORALES. And we have nothing further.

THE COURT: Okay.

(COUNSEL CONFERS WITH DEFENDANT.)

United States District Court

WESTERN DISTRICT OF TEXAS
Del Rio Division

UNITED STATES OF AMERICA

v.

Case Number: DR-08-CR-715(1)-AML

ISRAEL VARGAS-SOLIS

USM Number: 22315-280

Defendant.

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

******

Signed this the 12th day of March, 2009.

/s/ Alia Moses Ludlum
ALIA MOSES LUDLUM
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months with credit for time served since June 28, 2008, pursuant to 18

U.S.C. § 3584(a).

The Court makes the following recommendations to the Bureau of Prisons:

That the State officials run their sentences consecutively to the federal sentence.

The defendant shall remain in custody pending service of sentence.

United States District Court

WESTERN DISTRICT OF TEXAS
Del Rio Division

UNITED STATES OF AMERICA

v.

FRANCISCO CRUZ-GONZALEZ

DR-08-CR-981

DEL RIO, TEXAS
APRIL 8, 2009

SENTENCING

BEFORE THE HONORABLE ALIA MOSES LUDLUM

UNITED STATES DISTRICT JUDGE

******

APPEARANCES

FOR THE UNITED STATES OF AMERICA:
UNITED STATES ATTORNEY'S OFFICE
CETFSTE BLACKBURN
Assistant U.S. Attorney
Third Floor, U.S. Courthouse
111 East Broadway
Suite 300

Del Rio, Texas 78840

FOR THE DEFENDANT:
FRANCES CUSACK
OFFICE OF THE FEDERAL PUBLIC DEFENDER
2205 Veterans Boulevard
Suite A-2
Del Rio, Texas 78840

******

Okay. For everyone else: For Mr. Zarazua, it is the Order and the Judgment of the Court that the Defendant Silverio Zarazua-Oliva is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 18 months with credit for the time he has been in custody since August 19, 2008, to run consecutively to his pending state cases.

******

For Mr. Gonzalez-Rodriguez, it is the Order and the Judgment of the Court that the Defendant Valentin Gonzalez-Rodriguez is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a team of 18 months with credit for the time he has been in custody since September the15th of 2008 to run consecutively to his pending state indicate.

******

Other than talking to your clients, anything further on any of these cases?

MR. MORALES: No, Your Honor.

MR. PACHECO: No, Your Honor.

MS. DOUENAT: No, Your Honor.

MS. CUSACK: Yes, Your Honor. On behalf of Mr. Cruz-Gonzalez, we object to the running consecutively pending state litigation.

THE COURT: The Court overrules the motion.

Anything, Ms. Norton?

MS. NORTON: Nothing further, Your Honor.

THE COURT: Okay. Anything further, Ms. Blackburn?

MS. BLACKBURN: No, Your Honor.

THE COURT: Okay. All of you have a seat right now so that your attorneys can talk to you for a few minutes.

MS. BLACKBURN: Your Honor, may I be excused?

THE COURT: You may.

(COUNSEL CONFER WITH DEFENDANTS.)

United States District Court

WESTERN DISTRICT OF TEXAS
Del Rio Division

UNITED STATES OF AMERICA

v.

Case Number: DR-08-CR-981(1)-AML
USM Number 24563-280

FRANCISCO CRUZ-GONZALEZ

Defendant.

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

******

Signed this the 8th day of April, 2009.

/s/ Alia Moses Ludlum
ALIA MOSES LUDLUM
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 21 months with credit for time served since September 12, 2008, pursuant to 18 U.S.C. § 3584(a).

The Court makes the following recommendations to the Bureau of Prisons:

That the State officials run their sentences consecutively to the federal sentence. The defendant shall remain in custody pending service of sentence.

(JUNE 8, 2009, OPEN COURT.)

THE COURT: DR-08-CR-911; the United States of America vs. Jose Luis Rodriquez-Mena.

MR. LINDSEY: Herbert Lindsey for the United States Government.

MS. DEL RIO: Bianca Rocha Del Rio on behalf Mr. Rodriguez-Mena. We're ready to proceed.

******

It is therefore the Order and the Judgment of the Court that the Defendant Jose Luis Rodriguez-Mena is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 57 months with credit for the time he has been in custody since August the 21st of 2008; that upon release from imprisonment, Mr. Rodriguez, you will be -- this is going to run consecutive to your pending state cases -- that upon release from imprisonment you will be placed on term of supervised release of three years; that while on supervised release you shall comply with all the standard conditions of supervision adopted by the Court on May 27th, 2004.

One of your conditions is that you are not to return to the United States illegally. Mr. Rodriguez, do not return to the United States illegally for any reason at any time at any place. Do you understand?

THE DEFENDANT': Yes.

THE COURT: The Court finds that there is insufficient evidence to indicate that the defendant has the ability to pay a fine; therefore, no fine will be imposed. However, the Court will Order that the

defendant shall pay to the United States a special assessment of $100 which shall be due immediately. The Court will Order that the Presentence Report and all related documents be sealed and be made part of the record for appellate purposes. And I advise you, Mr. Rodriguez, you do have the right to appeal your sentence. Anything further, Mr. Lindsey?

MR. LINDSEY: No, ma'am, Your Honor.

THE COURT: Ms. Del Rio, anything further?

MS. DEL RIO: Nothing further, Your Honor.

THE COURT: Mr. Rodriguez, just have a seat right now so that your attorney can talk to you one more time.

(COUNSEL CONFERS WITH DEFENDANT.)

United States District Court

WESTERN DISTRICT OF TEXAS
Del Rio Division

UNITED STATES OF AMERICA

v.

Case Number: DR-08-CR-911(1)-AML
USM Number 24177-280

JOSE LUIS RODRIGUEZ-MENA

Defendant.

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

******

Signed this the 8th day of June, 2009.

/s/ Alia Moses Ludlum
ALIA MOSES LUDLUM
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody Of the United States Bureau of Prisons to be imprisoned for a term of 57 months with credit for time served since August 21, 2008, pursuant to 18

U.S.C. § 3584(a).

The Court makes the following recommendations to the Bureau of Prisons:

That the State officials run their sentences consecutively to the federal sentence. The defendant shall remain In custody pending service of sentence.